



# LOCAL CONTENT

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Australia – Mining & Petroleum



**Columbia Center  
on Sustainable Investment**

A JOINT CENTER OF COLUMBIA LAW SCHOOL  
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

# The project<sup>1</sup> - background



Resource-rich countries are increasingly inserting requirements for local content (“local content provisions”) into their legal framework, through legislation, regulations, contracts, and bidding practices. If successful, a policy to increase local content can lead to job creation, boost the domestic private sector, facilitate technology transfer and build a competitive local workforce. However, local content goals are often unfulfilled and the opportunities are not captured. For example, local content provisions typically require investors to meet targets measured as a percentage of investment, hours worked, equipment supplied, or jobs created. If targets are too high, they may either scare away investment or remain unmet as investors accept the fines or find loopholes. If they are too low, the country will not maximize potential linkages. This shows the importance of the framing of local content provisions. Targets, and other local content objectives, need to be carefully quantified, adapted to the local context and collaborative. Because local content provisions can be key to translating resource investments into sustainable benefits for the local population, this project examines the detail of the existing legal frameworks for local content in a number of countries.

CCSI has conducted a survey of the local content frameworks of a number of countries – identifying the key legislation, regulations, contracts and non-binding policies and frameworks dealing with local content issues in the mining and petroleum sectors<sup>2</sup>. A profile was created for each country, summarizing the provisions in the legal instruments dealing with local content and highlighting examples of high impact clauses<sup>3</sup> – those containing precise language which might be useful as an example to those looking to draft policies to enhance a country’s local content<sup>4</sup>. The profiles examine provisions dealing with local employment, training, procurement, technology transfer, local content plans as well as local ownership, depending on the country's approach to and definition of local content. In addition, as key to translating provisions into action, the profiles look at implementation, monitoring and enforcement provisions as well as the government’s role in expanding local involvement. Aside from emphasizing the strong clauses, which may be adaptable across countries, the profiles summarize the provisions but do not provide commentary, because local content is so context specific. The profiles are intended as a tool for policy makers, researchers and citizens seeking to understand and compare how local content is dealt with in other countries, and to provide some examples of language that might be adopted in a framework to achieve local content goals. Hyperlinks are provided to the source legislation, regulations, policies and contracts where available.

<sup>1</sup> The project is managed by Perrine Toledano and Sophie Thomashausen. Research was conducted by Carl Lundeholm.

<sup>2</sup> General legislation with provisions that relate to local content (for example, tax laws with incentives for local procurement or employment in any industry), was not included in the review. The review included dedicated mining or petroleum sector or specific local content legislation, regulations, policy and contracts.

<sup>3</sup> Those clauses are framed and singled out by a “thumb up”.

<sup>4</sup> Our criteria for assessment of the quality of the provisions were language that is less likely to present a loophole, i.e. less likely to be subject to interpretation due to vagueness and more likely to lead to enforcement because of its clarity in terms of rights and obligations of both parties (state and investor), and reasonable in its obligations on the company. In addition, as mentioned above, we looked for clauses that encourage collaboration between the company and the government in defining local content targets and goals, and those where the government has a role, as well as clauses enabling implementation and monitoring of the requirements and those giving the government strong remedies to enforce companies’ compliance.



## The impact of international law

The World Trade Organization (WTO)'s agreements and investment treaties can present an obstacle to the realization of local content goals by prohibiting some types of local content requirements (a sub-category of “performance requirements”<sup>1</sup>). CCSI therefore surveyed the relevant WTO agreements and investment treaties in each country profiled to identify the provisions that may prevent, counsel against and/or shield local content standards. These provisions are quoted in the profile in order to show the potential barriers to implementation of local content so that they can be kept in mind when countries enter into these international investment treaties<sup>2</sup>. Free Trade Agreements other than the WTO agreements, some of which may contain investment chapters, are not included in the scope of the review, but may also be relevant and should be similarly kept in mind.

<sup>1</sup>Performance requirements are measures in law, regulation or contract that require investors to meet specified goals when entering, operating or expanding in, or leaving a host country. Some are strictly mandatory; others are imposed as a condition for receiving some sort of added benefit or advantage.

<sup>2</sup>Countries implementing local content requirements should be aware of the possibility of a challenge to those provisions either through the WTO (state-to-state dispute settlement) or arbitration under the bilateral investment treaties (which is investor-state dispute settlement). While the potential for such actions may be low, they remain a risk depending on the circumstances, and particularly should relations between the state and the investor sour over the course of the investment.



## Highlights

- Requirement to prepare and implement an Australian Industry Participation (AIP) plan on how the project proponent will provide full, fair and reasonable opportunity to Australian entities to supply goods and services to the project.
- The AIP plan requirement applies to major projects in both the mining sector and the petroleum sector. It does not prescribe local content targets.
- Establishment of the AIP Authority and the AIP Advisory Board to monitor and promote compliance. Possibility for adverse publicity notice and/or court injunctions in case of non-compliance.
- Local content provisions also included in both State Agreements (agreements between a state and a project proponent ratified by an Act of Parliament) and in the Indigenous Land Use Agreements (agreements made between communities and project proponents). This profile reviewed the Gorgon State Agreement and the Argyle ILUA.

✓	Employment Requirements
✓	Procurement Requirements
✓	Training Requirements
✓	Technology Transfer Requirements
✓	Monitoring and Enforcement Mechanisms
✓	Government Obligations in Support of the Companies' Program



## International Law

### Legislation

[The Australian Jobs Act 2013](#) – Includes a requirement to prepare and implement an Australian Industry Participation (“AIP”) plan.

### Policy

[The Australian Industry Participation National Framework \(AIP National Framework\)](#) – Signed by Australian, State and Territory Industry Ministers in April 2001. In addition to the AIP National Framework, each State has its own industry participation policies.

*\*State Agreements* - Entered into between a state and a project proponent and ratified by an Act of Parliament.

### Contract

[\\*Indigenous Land Use Agreements](#) (“ILUAs”) - Entered into between people who hold, or claim to hold, native title over a particular area (traditional owners), and a project proponent with an interest in that area.

State Agreements and ILUAs may contain local content provisions.

\* In this profile we reviewed the Gorgon State Agreement and the Argyle ILUA Management Plan.

## Key definitions

- **AIP matter** means:
  - “a) a matter relating to the opportunities for Australian entities to bid for the supply of key goods or services for a designated project; or
  - b) a matter relating to the opportunities for Australian entities to bid for the supply of key goods or services for the initial operational phase of a new relevant facility in relation to a designated project” (The Australian Jobs Act 2013, Sec. 5).
- **Full, Fair and Reasonable Opportunity** means:
  - “*Full*: Australian industry has the same opportunity afforded to other global supply chain partners to participate in all aspects of an investment project (e.g. design, engineering, project management, professional services, IT architecture);
  - Fair*: Australian industry is provided the same opportunity as global suppliers to compete on investment projects on an equal and transparent basis, including being given reasonable time in which to tender; and
- *Reasonable*: tenders are free from non-market burdens that might rule out Australian industry and are structured in such a way as to provide Australian industries the opportunity to participate in investment projects” (AIP National Framework, Sec. 3).
- **Major Project** means:
  - “1) If the total expenditure of a capital nature that has been incurred, or is reasonably likely to be incurred, in carrying out a designated project is greater than or equal to the major project threshold amount, the project is a major project for the purposes of this Act.
  - 2) For the purposes of this Act, major project threshold amount means \$500 million” (The Australian Jobs Act 2013, Sec. 8).
- **Traditional Owner** or **TO** means: A group of Aboriginal persons who authorise certain ILUAs under the Native Title Act, or native title holders (Traditional Owner Settlement Act 2010 (Vic). S. 3).

# Overview



## Rights application

- Project proponents of all major projects with a capital expenditure of \$500 million or more must prepare and implement an Australian Industry Participation (**AIP**) plan.
- The AIP plan requirement applies to major projects in both the mining sector and the petroleum sectors. Additional AIP requirements may exist on the state level.

## Procuring goods and services

- An AIP plan must state that the key objective of the plan is that Australian entities should have full, fair and reasonable opportunity to bid for the supply of key goods or services for the project.
- The AIP plan must also state that the project proponent for the project will conduct awareness programs about opportunities for Australian entities to supply key goods or services for the project.
- The Management Plan of the Argyle ILUA includes several detailed measures for Argyle and the TOs to work together to increase mine-related business opportunities for local communities.

## Technology Transfer

- The AIP National Framework recognizes that significant competitiveness gains can be achieved by building strategic alliances, improving access to competitive infrastructure, encouraging innovation and the uptake of technology and skills.

## Employment

- When entered into between a State government and a project proponent, State Agreements may prescribe the use of local labor and professional services.
- The Management Plan of the Argyle ILUA includes detailed measures to increase the employment of TOs and aboriginal community members.

## Implementation

- Non-compliance with the AIP plan requirements may lead to adverse publicity notice and/or court injunctions.
- The AIP National Framework recognizes the role of the Australian Governments in implementing the framework.

## Monitoring and enforcement

- The Australian Industry Participation Authority (the **AIP Authority**) is charged with monitoring and promoting compliance with the Australian Jobs Act 2013 as well as advising and assisting persons in relation to their obligations under the Act.
- The AIP Authority may seek advice from the Australian Industry Participation Advisory Board.

# Applications for rights and permits



- The Australian Jobs Act 2013 is a Commonwealth Act that requires that project proponents of all major projects with a capital expenditure of \$500 million or more prepare and implement an Australian Industry Participation (AIP) plan. An AIP plan outlines how the project proponent will provide full, fair and reasonable opportunity to Australian industry to supply goods and services to the project. It does not prescribe local content targets.
- An AIP plan is required for major projects establishing, expanding, improving, or upgrading a facility, covering all the phases of the project.
- The AIP plan requirement applies to major projects in both the mining and the petroleum sectors. Additional AIP requirements may exist on the State level.
- Section 4 of the AIP National Framework describes the strategic approaches the Commonwealth Government and the State and Territory Governments (the Australian Governments) have identified to give effect to the Framework, which includes recognition of the economic impacts of an investment project on Australian industry:



## **“4. Enhancing Project Facilitation and Australian Industry Participation**

[...] Without limiting or prescribing their content, a project proponent’s [AIP plan] could include: [...]  
- a recognition of the economic impacts of an investment project on Australian industry (eg. employment, skills transfer, strategic alliances and regional development) and the need for communication of these impacts. [...]”

# Procuring Goods and Services (1)



- An AIP plan is divided into three parts: Part A which states the title of the plan, Part B which deals with the Project Phase, and Part C which covers the Initial Facility Operational Phase. Part C is only included if the project involves establishing a new facility. The Australian Jobs Act 2013 contain similar requirements for Part B and Part C. Section 34 of the Act requires the AIP plan to state the key objective in Part B (the same requirement applies to Part C, section 38):



“Part B of an AIP plan for a major project must state that the key objective of Part B of the plan is that Australian entities should have full, fair and reasonable opportunity to bid for the supply of key goods or services for the project.”

- Section 35 of the Australian Jobs Act 2013 outlines the primary obligations of the project proponent which includes ensuring that the capability and capacity of Australian entities to supply goods or services for the project is taken into account:



“1) Part B of an AIP plan for a major project must state that, until the project is completed, the project proponent for the project will take all reasonable steps to ensure that each procurement entity for the project will achieve the following objectives:

(a) the key objective of Part B of the plan;

[...]

(c) the objective that the procurement entity will not request bids to supply key goods or services for the project unless the procurement entity has a broad understanding of the capability and capacity of Australian entities generally to supply those goods or services;

[...]

(e) the objective that:

(i) standards for key goods or services for the project that are to be acquired by the procurement entity will be published on the website of the procurement entity; and

(ii) if the standards are neither Australian standards nor international standards—the procurement entity will publish on its website a statement explaining why neither Australian standards nor international standards are being used; [...].”

# Procuring Goods and Services (2)



- Section 36 of the Australian Jobs Act 2013 outlines other obligations for the project proponent, including conducting awareness programs about the opportunities for Australian entities to supply goods or services for the project:



“1) Part B of an AIP plan for a major project must state that, until the project is completed, the project proponent for the project will:

[...]

(b) conduct awareness programs about opportunities for Australian entities to supply key goods or services for the project; and

(c) conduct training programs that are:

(i) for employees of procurement entities for the project; and

(ii) directed towards ensuring that the objectives set out in section 35 are achieved; and

(d) publish on its website a statement of the proponent’s expectations in relation to:

(i) key goods or services that are likely to be acquired for the project; and

(ii) opportunities for Australian entities to supply key goods or services for the project; and

(iii) opportunities for non Australian entities to supply key goods or services for the project;

broken down into categories of goods or services in the way specified in the legislative rules; and [...]

(f) if the project proponent has a global supply chain—encourage Australian entities that are supplying, or have supplied, key goods or services for the project to:

(i) develop the capability and capacity to supply key goods or services to the project proponent’s global supply chain; and

(ii) integrate into the project proponent’s global supply chain [...]

- Section 4 of the AIP National Framework further recognizes the importance of integration into global supply chains:



## “4. Enhancing Project Facilitation and Australian Industry Participation

[...] Without limiting or prescribing their content, a project proponent’s [AIP plan] could include:[...]

- support for the integration of Australian industry into global supply chains [...]

# Procuring Goods and Services (3)



- According to the Argyle ILUA, Argyle is committed to increase business opportunities connect with its mining operations for local businesses and especially business owned and controlled by TOs or aboriginal communities (Management Plan 7, Art. 4.2).
- A Business Development Taskforce, composed of 5 Argyle representatives and 5 Traditional Owners representatives is also required to be established to expand such business opportunities (Management Plan 7, Arts. 3.2 and 4.1):



“The Business Development Taskforce has the following functions

- (a) (...)
- (b) to inform TOs Business of any contracting opportunities notified by Argyle under clause 6;
- (c) to consider future contracting opportunities which may arise at the Mine for TO Business;
- (d) to review the outcome of tenders in which TO Businesses have participated;
- (e) to consider ideas for potential TO Businesses;
- (f) to consult with the TOs in relation to viable business opportunities;
- (g) to work with government and community agencies to develop business support and incubation services in the East Kimberley region;
- (h) to consider what goods and services can be provided by TOs directly to Argyle at the Mine, without the need for a general tender process to be conducted;
- (i) to consider joint ventures between Argyle and TO Businesses in relation to the Argyle Operations at the Mine; and
- (j) (...)

- For the first 3 years of the Management Plan, Argyle will provide support to TO Businesses through a suitably qualified business development facilitator to provide the following services (Management Plan 7, Art 5.3):



“(...

- (a) information to the TOs on where to seek loans;
- (b) assistance to TOs in preparing such loan applications;
- (c) information on what funds may be available for distribution from the Charitable Trust and the Special Purposes Trust;
- (d) assistance in preparing applications for such distributions;
- (e) information on how to obtain financial support from and develop partnerships with Local, State and Commonwealth Governments;
- (f) assistance in obtaining financial support and developing such partnerships with Local, State and Commonwealth Governments;
- (g) information on what the Business Development Facilitator considers likely to be viable business opportunities;
- (h) assistance on how to obtain business related education and training;
- (i) assistance in applying for such business related education and training;
- (j) Information on good governance and business practice.”

# Procuring Goods and Services (4)



- Argyle commits to ensuring that the business development facilitator addresses all TO Business requests. However the appropriate level of assistance to TO Businesses is to be determined by Argyle (Management Plan 7, Arts. 5.6, 5.7)
- The business development facilitator is accountable to the Business Development Taskforce (Management Plan 7, Art. 5.8):



“Subject to privacy and confidentiality constraints, the Business Development Facilitator will provide an annual report to the Business Development Taskforce and the TO Relationship committee as to what information and assistance has been provided to TOs and how requests for assistance by TOs were dealt with.”

- Argyle will give preference to TO Businesses in his tenders (Management Plan 7, Arts. 7.1 and 7.2). Argyle will also give feedback on the unsuccessful proposals (Management Plan 7, Art 7.3):



“If a TO Business unsuccessfully tenders for a contract, Argyle will within 4 weeks of awarding that contract, provide a written report to the Business Development Taskforce outlining the reasons why the tenders was unsuccessful.”

- Argyle is also committed to ensure that its suppliers provide opportunities to TOs (Management Plan 7, Arts. 8.1, 8,2):



“8.1 Argyle will ensure that every request for tenders which relates to the provision of goods and services to Argyle at the Mine Site of a value of over \$250,000 in a year, requires the tenderer to provide details of the measures the tenderer will take to:

- (a) involve TO Businesses in the contract;
- (b) provide employment and/or trainings to TOs;
- (c) provide benefits to TOs.

8.2 If more than one Non – TO Business tenders for a contract then, if Argyle is the opinion that the 2 businesses are each as good as the other for the contract opportunity, then Argyle will provide a preference to the Non-TO Business that will provide, in Argyle’s opinion, the greatest benefit to TOs.”

- Argyle agrees to liaise with the Business Development Taskforce to ensure that the information is disseminated at each tender (Management Plan 7, Art. 8.5):



“In respect of each request for tender covered by this clause, Argyle will ensure that the Business Development Taskforce is informed of the measures that each tenderer is prepared to take to involve TO Businesses and promote employment, training and /or benefits to TOs. This information may be provided by Argyle after the tender is let. For the avoidance of doubt the Business Development Taskforce has no role in tender selection but may provide Argyle with comments on the information provided by tenderers under this clause.”



- Section 4 of the AIP National Framework describes the strategic approaches the Commonwealth Government and the State and Territory Governments (the Australian Governments) have identified to give effect to the Framework, including the importance of technology transfers:



## **“1. Encouraging industry to meet world’s best practice through capability building**

Governments continue to work with and encourage industry to increase its capabilities and strive for world’s best practice.

Significant competitiveness gains can be achieved by building strategic alliances, improving access to competitive infrastructure (hard and soft), encouraging innovation and the uptake of technology and skills, and through the creation and application of knowledge to create wealth.

Enterprising Australian industry can exploit opportunities to move towards best practice through establishing strategic alliances and other key relationships to gain knowledge and improve products and services. Enhanced capabilities and augmented market presence will facilitate the development of a competitive edge. [...]



- State Agreements are negotiated on an ad hoc basis and facilitate the implementation of large resource projects by specifying the rights, obligations, terms and conditions for the project's development. They are particularly prevalent in Queensland, South Australia and Western Australia.
- By entering into a State Agreement the project is able to proceed outside many State laws, for example the State's mining laws, which can be advantageous for the project proponent. However, a State Agreement cannot override a Commonwealth Act. In return for the State's concessions with regards to State law, the project proponent may agree to obligations that enhance the State's policy objectives, such as local content requirements.
- An example of a State Agreement is the Gorgon Gas Processing and Infrastructure Project Agreement entered into between the State of Western Australia and several international energy companies on September 9, 2003. The implementation of the agreement was ratified and authorized by the Parliament of Western Australia through the enactment of the Barrow Island Act 2003 on November 20, 2003.
- The Gorgon Gas Processing and Infrastructure Project Agreement is included in Schedule 1 to the Barrow Island Act 2003. Section 15 of the agreement prescribes the use of local labor professional services and materials:



“(1) Except as otherwise agreed by the Minister the Joint Venturers shall, for the purposes of this Agreement

(a) except in those cases where the Joint Venturers can demonstrate it is not reasonable and economically practicable so to do, use labour available within Western Australia (using all reasonable endeavours to ensure that as many as possible of the workforce be recruited from the Pilbara) or if such labour is not available then, except as aforesaid, use labour otherwise available within Australia; [...]

## Training and employment (2)



- In the ILUA, Argyle commits to increasing the employment of local aboriginals and to implementing procedures to doing so (Management Plan 2, Arts 2.3 , 2.6):



“2.3 Argyle supports Aboriginal employment and has a number of systems and procedures in place to encourage Aboriginal employment. In particular, Argyle:

(a) aims to have Local Aboriginal People comprising at least 40% of its workforce at the Mine by the time underground operations commence in approximately 2008 and maintaining that level until Cessation of Production Operations;

(b) if Argyle cannot or does not meet the aim set out in (a), then Argyle will:

- (1) review Argyle’s recruitment and training practices; and
- (2) inform the TO Relationship Committee and work with the TO Relationship Committee to try and find a way to meet that aim

(c) recognizes the importance of providing opportunities for Aboriginal employees to progress along career paths within Argyle on their merits;

(d) recognizes that some Aboriginal people have particular cultural obligations which require flexible work practices; and

(e) recognizes the importance of Aboriginal employees of informal mentoring and performance management systems.

2.6 Even though the Indigenous Training Program finishes in 2007, Argyle, will maintain a recruitment and training program designed to assist Argyle meet the aim of at least 40% employment of Local Aboriginal people as set out in 2.3 (a)

- The Argyle ILUA also requires Argyle to facilitate skills training to assist local community members to obtain more skilled jobs (Schedule 2, Art. 3.2):



Areas of career development may be for example, Occupational Health & Safety, upgrading of process plant operation skills, or furthering administration skills. Career development opportunities are identified as part of Argyle’s Performance Review Process [fully detailed in the Schedule], where the Team Leader and Team Member jointly develop a plan for the Team Member that identifies development needs and activities to build skills and knowledge to fulfill these needs.

# Training and employment (3)



- Argyle commits to giving preference to the employment of TOs over others if, in Argyle's view, they can do the job well (Management Plan 2, Art .6).
- Argyle will provide an employment and training mine tour and workshop to encourage TOs to apply for training and employment opportunities (Management Plan 2, Art 8.2):



“Within 6 months of the Commencement Date Argyle will conduct the employment and training mine tour and workshop which will include the following characteristics:

- (a) the participation of a maximum of 12 TOs over 18 years old;
- (b) the participation of a maximum of 10 TOs under 18 years old;
- (c) the participation of a number of Aboriginal people currently employed at the Mine in a variety of roles
- (d) an overnight stay in the Argyle village;
- (e) day and night time, on early morning tours of the Mine;
- (f) a full or partial induction;
- (g) presentation about the types of employment available at the Mine during open pit mining and during underground mining, and working life at the Mine;
- (h) a facilitated workshop to identify the manner in which TOs can best access training and employment opportunities at the Mine.”

- Pre-employment training programs are available to TOs (Schedule 2, Art.1.2 and 1.3):



1.2 Pre-employment training programs are available to expose participants to the requirements of employment, particularly within Argyle. Pre-employment training programs will be run between 2 and 4 weeks, and consists of on and off- the –job training that focus on areas such as work ethics, life skills, personal safety, communication skills, shift-work, computers and numeracy and literacy skills.

1.3 Participants who successfully complete the program will receive a Certificate of Attainment, and may be considered for full-time employment, part-time employment, traineeships, or apprenticeships.



- Section 3 of the AIP National Framework recognizes the role of the Australian Governments in implementing the framework:



## “Free of interstate preferences

States and Territories reconfirm that they will not use State/Territory purchasing preference arrangements, providing maximum benefit to industry across Australia and fostering Australian industry competitiveness.

[...]

## Policy Consistency

A consistent policy environment has a significant bearing on reaffirming investor confidence and therefore maximizing opportunities for Australian industry to participate in investment projects. Governments dedicate considerable resources to the policy making process to ensure policy decisions are relevant and timely, to allow for effective consultation and adequate lead in times, and to minimize the disruptions that may result from policy changes. [...]

- The breakdown of roles and responsibilities between the Australian Governments and the industry is clearly articulated in Section 4 of the AIP National Framework:



## **“2. Early identification of opportunities for Australian industry participation, both domestically and overseas**

[...] Government investment attraction agencies, ISOs (Industrial Supplies Office (NSW, SA, Tas, Vic, WA) or Industry Search and Opportunities (ACT, NT, Qld), Austrade, AusAID, Commonwealth, State and Territory departments and local governments all identify opportunities for Australian industry participation, as do private sector investment agencies and industry associations. These efforts provide useful information for Australian industry in already identified projects. Governments will work together to seek better ways to gather and share market intelligence on emerging opportunities.

Industry is well placed to develop strategies to source information about emerging opportunities. Industry can take advantage of these opportunities by building strategic networks that can acquire timely information, and proactively disseminate quality information about Australian industry capabilities. [...]



- Section 67 of the Australian Jobs Act 2013 establishes the AIP Authority. The AIP Authority is the statutory officer responsible for administering the Act. The Commonwealth Minister for Industry and Science appoints the acting AIP Authority. The current acting AIP Authority's term ends on May 5, 2016.
- The functions of the Australian Industry Participation Authority are described in Section 68 of the Act:

“(1) The functions of the Authority are:



- (a) such functions as are conferred on the Authority by this Act; and
  - (b) to advise and assist persons in relation to their obligations under this Act; and
  - (c) to monitor compliance with this Act; and
  - (d) to promote compliance with this Act; and
  - (e) to collect, analyse, interpret and disseminate information relating to AIP matters; and
  - (f) to support, encourage, conduct and evaluate training programs that are directed towards improving the skills and knowledge of people involved in AIP matters; and
  - (g) to support, encourage, conduct and evaluate educational, promotional and community awareness programs that are relevant to AIP matters; and
  - (h) to support, encourage, conduct and evaluate research about AIP matters; and
  - (i) to advise the Minister about AIP matters; and
  - (j) to consult and cooperate with other persons, organisations and governments on AIP matters; and
- legislative rules; and
- (l) such functions as are conferred on the Authority by a law other than this Act; and
  - (m) such other functions (if any) as are specified in the legislative rules; and
  - (n) to do anything incidental to or conducive to the performance of any of the above functions.”

- Section 85 of the Australian Jobs Act 2013 confers upon the Minister the power to establish the Australian Industry Participation Advisory Board.
- To further Argyle's aboriginal employment strategy, the Department of Employment and Workplace Relations has granted Argyle a sum of \$5.1 million to employ and train 150 Indigenous employees during 2004- 2007 (Management Plan 7, Schedule 2, Art 1.1).

# Monitoring and enforcement



- Section 36 of the Australian Jobs Act 2013 contains obligations for the project proponent that facilitate the monitoring and enforcement of the Act's requirements:



“1) Part B of an AIP plan for a major project must state that, until the project is completed, the project proponent for the project will:

(g) both:

(i) at all times have an employee who is designated as the project proponent's contact officer for the purposes of this Act; and

(ii) notify the Authority of the contact officer's contact details.”

- Section 57 of the Australian Jobs Act 2013 states the administrative consequences of non-compliance with the Act in relation to the implementation of an AIP plan:



“*Adverse publicity notice*

[...]

(2) The Authority may, by written notice given to the relevant person, require the relevant person to:

(a) take either or both of the following actions within the period specified in the notice:

(i) to publicise, in the way specified in the notice, the contravention, the details of the contravention, and any other related matter;

(ii) to notify a specified person or specified class of person, in the way specified in the notice, of the contravention, the details of the contravention, and any other related matter; and

(b) give the Authority, within 7 days after the end of the period specified in the notice, evidence that the action or actions were taken by the relevant person in accordance with the notice.

[...]

*Naming relevant person etc. in annual report*

(4) The Authority may, in a report under section 83:

(a) name the relevant person as having contravened Part 2, 3 or 4 [ all related to the AIP plan], and set out details of the contravention; and

(b) if the relevant person is a subsidiary of a body corporate—name the relevant person as a subsidiary of the body corporate.”

- Court injunctions in the form of restraining injunctions or performance injunctions can also be issued for failure to implement an AIP plan (the Australian Jobs Act 2013, section 58).



- Foreign investment proposals are also reviewed on a case-by-case basis under the Foreign Acquisitions and Takeovers Act 1975 (**FATA**). Proposed investments are notified to the Treasurer of Australia after which they are reviewed by the Foreign Investment Review Board (**FIRB**). The Treasurer has the discretion to prevent an investment if it is determined that allowing it to proceed would be against the national interest.
- The FATA does not define the national interest but instead confers upon the Treasurer the power to decide in each case whether a particular proposal would be contrary to the national interest. Australia's Foreign Investment Policy (updated in June 2015) clarifies the assessment of the national interest:



## **“National Interest Considerations**

[...]The Government typically considers the following factors when assessing foreign investment proposals in any sector. [...]

### Impact on the economy and the community.

The Government considers the impact of the investment on the general economy. The Government will consider the impact of any plans to restructure an Australian enterprise following an acquisition. It also considers the nature of the funding of the acquisition and what level of Australian participation in the enterprise will remain after the foreign investment occurs, as well as the interests of employees, creditors and other stakeholders.

The Government considers the extent to which the investor will develop the project and ensure a fair return for the Australian people. The investment should also be consistent with the Government’s aim of ensuring that Australia remains a reliable supplier to all customers in the future. [...]”



- Australia has been member of the WTO since January 1, 1995.
  - All World Trade Organization (WTO) Members must adopt and abide by the obligations of TRIMs. <sup>1</sup> This can impact a country's ability to impose certain local content requirements (referred to as "investment measures"), to the extent they affect trade in *goods*.
  - The following types of local content requirements are covered by TRIMS<sup>2</sup>:
    - requiring a company to purchase or use products of domestic origin – TRIMs prohibits discrimination between goods of domestic and imported origin;
    - limiting the amount of imported products that an enterprise may purchase or use depending on the volume or value of local products that the enterprise exports;
    - restricting foreign exchange necessary to import (e.g., restricting the importation by an enterprise of products used in local production by restricting its access to foreign exchange); and
    - restricting exports.
- 
- <sup>1</sup> The TRIMs Agreement clarifies existing rules contained in Articles III (National Treatment Obligation (NTO)) and XI (Prohibition on Quantitative Restrictions) of the General Agreement on Tariffs and Trade (GATT), 1994.
  - <sup>2</sup> It is important to be aware of the types of measures prohibited under the TRIMs Agreement, in order to avoid the potential for dispute settlement under the WTO - a state can bring an action against another state for an alleged violation of the TRIMs Agreement (i.e. "state-to-state action").



## General Agreement on Trade in Services (GATS)

- A separate WTO agreement, the General Agreement on Trade in Services (“GATS”), covers investment measures related to services (in Article XVI), including the following which are relevant to local content:
  - Requirements to use domestic service suppliers
  - Limits on the number of service suppliers
  - Limits on the total value of service transactions or assets
  - Limits on the total number of service operations or quantity of service output
  - Limits on the total number of natural persons permitted
  - Restrictions on or requirements for certain types of legal entities (e.g., joint venture requirements)
  - Imposition of domestic equity
- GATS only applies to those service sectors that the country chooses to include in its Schedule of Commitments. Australia’s [commitments](#) relating to business services, construction and related engineering services, and transport services may affect the implementation of Australia’s local content framework.



- As of 9 November 2015, Australia has entered into **23 bilateral investment treaties** (BITs) and 21 are in force.<sup>1</sup>
- Investment treaties are international agreements between two or more countries which establish the terms and conditions of foreign investment within each country and provide rights directly to the investors of each country which is party to the treaty. The treaties can contain restrictions on local content requirements.<sup>2</sup>
- Investment treaties can contain the following types of provisions, each of which affects a country's ability to impose local content requirements:
  - non-discrimination provisions (“national treatment” and “most-favored nation” obligations), which are relevant in the context of local content when:
    1. host countries require some foreign investors to source from certain goods and service providers but don't impose similar requirements on other investors; and
    2. host countries give an advantage to some domestic or foreign goods and services providers, but not to a foreign provider whose state has a relevant treaty with the host country. (Note that this is relevant only where the foreign provider of goods or services has or, intends to have<sup>3</sup>, a presence in the host country);
  - restrictions on capital transfers;
  - “pre-establishment” protections, which prevent a state from imposing conditions on foreign investors that are not imposed on domestic investors, such as requirements to transfer technology to local firms, to establish the firm through a joint venture, or to reinvest a certain amount of capital in the host country;
  - incorporation of the TRIMs agreement; and
  - explicit prohibition of performance requirements that go beyond what is restricted by the TRIMs Agreement.

<sup>1</sup> According to UNCTAD's [country specific list of bilateral investment treaties](#)

<sup>2</sup> It is important to be aware of the BITs a country has signed and the types of requirements prohibited under it, in order to avoid the potential for arbitration against the country - the majority of investment treaties allow investors to bring arbitration claims directly against the country in which they have invested (“investor-state arbitration”).

<sup>3</sup> I.e., the conditions under which an investor may enter into the territory of a party, not only the conditions once the investment is made.



- Among the 23 BITS signed by Australia, all were reviewed (and are available on [UNCTAD database](#)).
- Aside from the inclusion of National Treatment Obligations and Most Favored Nation clauses, which are included in most BITs, the majority of Australia's BITs also can prohibit or limit performance requirements related to employment of personnel. We note however that those clauses defer to the national laws of the country ("subject to its laws applicable from time to time...." ) The clause quoted below is included, with some variation, in all but one of Australia's BITs (Chile).

## **Australia – Turkey**

### *Article 5: Entry and Sojourn of Personnel*

"1. Each Party shall, subject to its laws applicable from time to time relating to the entry and sojourn of non-citizens, permit natural persons who are investors of the other Party and personnel employed by legal persons of that other Party to enter and remain in its territory for the purpose of engaging in activities connected with investments.

2. Each Party shall, subject to its laws applicable from time to time, permit investors of the other Party who have made investments in the territory of the first Party to employ within its territory key technical and managerial personnel of their choice regardless of citizenship."